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FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

**BEFORE THE FEDERAL ELECTION COMMISSION**

JAN 15 1 35 PM '98

In the Matter of )

**SENSITIVE**

Freedom's Heritage Forum )

MUR 4012

and Arthur A. Cerminara, as Treasurer )

and Frank G. Simon, M.D., as Treasurer )

Hardy for Congress )

and Bob Ross, as Treasurer )

Timothy Hardy )

Lewis for Congress )

and Bob Ross, as Treasurer )

Richard Lewis )

**GENERAL COUNSEL'S REPORT**

**I. BACKGROUND**

Based upon allegations of coordination presented in a complaint and supplemental complaint filed by Maureen Keenan, and upon responses, on July 18, 1995, the Federal Election Commission ("Commission") found reason to believe that the Freedom's Heritage Forum ("Forum") and Arthur Cerminara, as treasurer, violated 2 U.S.C. § 434(b) by improperly reporting certain contributions as independent expenditures, insufficiently identifying the purpose of the expenditures, and failing to itemize their receipts; 2 U.S.C. § 434(c) by failing to certify Schedule E of the 1994 July Quarterly Report and failing to report certain independent expenditures within the required 24-hour period; 2 U.S.C. § 441a(a)(1)(A) by making excessive contributions to the Hardy for Congress Committee and the Lewis for Congress Committee; and 2 U.S.C. § 441d(a)(3) by failing to include the appropriate disclaimer in each of the Hardy and Lewis tabloids. On that date, the Commission also found reason to believe that the Hardy for Congress Committee and Bob Ross, as treasurer, and the Lewis for Congress Committee and Bob Ross, as treasurer, each violated 2 U.S.C. § 434(b) by failing to report contributions from

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the Forum; 2 U.S.C. § 434(a)(6)(A) by failing to file 48-hour reports for some of those contributions; and 2 U.S.C. § 441a(f) by knowingly accepting excessive contributions. The Commission also found reason to believe that Timothy Hardy and Richard Lewis, in their individual capacities as candidates, each violated 2 U.S.C. § 441a(f) in that they knowingly accepted excessive contributions from the Forum. Finally, on October 29, 1996, the Commission found reason to believe that Frank Simon, M.D., as treasurer of the Forum ("Forum Respondents") violated 2 U.S.C. §§ 434(b), 434(c), 441a(a)(1)(A), and 441d(a)(3).

After conducting an investigation, the General Counsel's Office sent briefs to the Forum Respondents, Timothy Hardy and Richard Lewis. See General Counsel's briefs ("GC Brief" unless otherwise specified refers to the Brief sent to the Forum Respondents) dated October 2, 1997. After an extension of time, the Forum Respondents submitted a reply brief which was received on November 7, 1997. Attachment 1. Richard Lewis submitted a letter in response to the brief which was received on October 27, 1997. Attachment 2. Timothy Hardy did not submit a response.<sup>1</sup> In their reply brief, the Forum Respondents request that the Commission find no probable cause to believe that they violated the statute. In his reply, Richard Lewis maintains that neither he nor anyone in his campaign was involved in any way in the preparation and dissemination of materials other than those paid for by his committee. For the reasons set forth in the General Counsel's Briefs in this matter, which are incorporated herein by reference, and for the reasons discussed in detail below, this Office recommends that the Commission make knowing and willful probable cause findings against the Forum Respondents and Timothy Hardy

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<sup>1</sup> When this Office did not receive a response from Timothy Hardy after the deadline, this Office attempted to contact Hardy by phone. When Hardy did not return the phone calls, the General Counsel's Brief was resent to him by Federal Express. Hardy acknowledged delivery of the brief via Federal Express on October 30, 1997. Attachment 3.

with respect to coordination, reporting, and disclaimer violations. This Office further recommends that the Commission find probable cause to believe that Richard Lewis knowingly accepted excessive contributions, but take no further action and close the matter as to Richard Lewis. This report also recommends disposition of the remaining respondents in this matter.

## **II. DISCUSSION OF RESPONSES**

### **A. Overview**

The General Counsel's investigation revealed that Dr. Frank G. Simon, the founder and president of the Freedom's Heritage Forum, a political committee promoting pro-life and other issues, had numerous campaign-related contacts with candidates Timothy Hardy and Richard Lewis during their 1994 campaigns for the 3rd Congressional District of Kentucky. The coordination issue is discussed below. The express advocacy communications are discussed at pages 13-14.

### **B. Coordination Issue/Timothy Hardy**

This discussion focuses on issues raised in the Forum Respondents' reply brief--Hardy did not submit a response--and the evidence uncovered during the investigation. We note at the outset that Respondents, in the reply brief, do not dispute that the events described in the GC brief at pages 4-10 occurred during the 1994 primary election campaign where Hardy opposed Susan Stokes. Respondents, however, argue that the General Counsel has "mischaracterized" some of these events and made unsupported conclusions that there was coordination. Attachment 1. In fact, as explained below, the evidence shows a continuum of coordination between the Forum Respondents and the Hardy campaign.<sup>2</sup>

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<sup>2</sup> Respondents incorrectly argue that the General Counsel used a standard for coordination "which presumes coordination if there has been contact of any sort between a candidate and a political committee which engages in independent expenditure activities," and further states that

Respondents argue there is no basis for the GC Brief's conclusion that at the January 4, 1994, meeting at Shoney's where Dr. Simon first met Hardy, the "information provided . . . conveyed to Dr. Simon that Hardy was serious about running, that Hardy's views were compatible with the Forum's and worthy of support, and that Hardy would need assistance with his campaign." Attachment 1 at 2 quoting from GC Brief at 5. Respondents further argue that our "version of the facts" does not support the conclusion that Hardy discussed "plans, projects, and needs" of his campaign, especially given that Hardy had not yet declared his candidacy. *Id.*

The evidence shows that the Forum Respondents were involved from the beginning in the recruitment of Hardy. Following calls from Corley Everett (a Forum volunteer who became Hardy's campaign manager) urging him to run, Hardy spoke at the Shoney's meeting about his interest in running. Dr. Simon testified that at the meeting, Hardy spoke to a small group of individuals active in the pro-life issue and that the purpose for the meeting "was to see if he [Hardy] was going to run and how we stood on some of the issues." Deposition of Dr. Frank G. Simon ("Simon Depo.") at 144 and 176.<sup>3</sup> Dr. Simon further testified that Hardy stated that "he

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"[t]his standard does not comport with [either] the 'actual coordination' test embraced by the Supreme Court in *Colorado Republicans* or the now-suspect 'presumed coordination' test contained in the FEC regulations." Attachment 1 at 8. Respondents argue that the law applicable to the coordination issue should be "actual coordination," citing *Colorado* for the proposition that there must be evidence of 'actual coordination as a matter of fact' before coordination could become an issue." *Id.* at 1-2. In *Colorado Republican Federal Campaign Committee v. FEC*, 116 S.Ct. 2309, 2315 (1996), the Court ruled that political party expenditures could not automatically be presumed to be coordinated expenditures, stating that "[t]he summary judgment record shows no actual coordination with candidates as a matter of fact," and that the evidence before it did not establish that the advertising campaign was developed "pursuant to any general or particular understanding with a candidate." The current matter, however, does not involve the automatic presumption of coordination and the Commission's investigation has uncovered compelling factual evidence of coordination.

<sup>3</sup> This report references several deposition transcripts. These transcripts are available for review in OGC Docket.

would like to run but he had some hesitation because of his wife and his financial situation.”

Simon Depo. at 160. According to Dr. Simon, Hardy also discussed and answered questions about his background, his pro-life position and opposition to Stokes. Simon Depo. at 159-161.

In short, during the meeting at Shoney’s, Hardy essentially communicated to the group his interest in running, that his pro-life issue stand matched theirs, and his need for financial support. These discussions can be fairly characterized as involving plans to run, important issues to focus on (pro-life) and needs (financial). In fact, soon after the Shoney’s meeting, Dr. Simon began filling Hardy’s need for financial assistance by providing direct financial support and volunteers to the Hardy campaign. See GC Brief at 8-9.

By January 8, 1994, Dr. Simon had referred a CPA named Bob Ross to serve as volunteer treasurer for Hardy. Respondents, however, suggest there is no basis to conclude that Dr. Simon had a role in recommending Bob Ross to serve as treasurer for the Hardy campaign. He claims that testimonies of individuals demonstrate that no one recalls how Bob Ross came to be treasurer for the Hardy campaign and that, in any event, the issue is irrelevant because there are no allegations that Ross ever communicated anything to the Forum regarding the Hardy campaign. Attachment 1 at 2-3.

Hardy and Everett each claimed not knowing initially who Ross was and each named the other as the person who first came up with Ross’ name as treasurer. The testimonies, however, of the individuals directly involved--Bob Ross and Dr. Simon--point to Dr. Simon as being responsible for lining up Ross to serve uncompensated as treasurer to the Hardy campaign. Ross specifically testified that Dr. Simon was the only person he could think of that might have referred him to Hardy. Deposition of Bob Ross (“Ross Depo.”) at 43. Dr. Simon testified that

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he recalls someone, perhaps Corley Everett, telling him that Hardy needed a treasurer and that he may have talked to Ross in January 1994 (after the meeting at Shoney's Restaurant) to ask him to serve as treasurer for Hardy's campaign. Simon Depo. at 180. Finally, the referral of Ross to the Hardy campaign in response to Hardy's need for support is evidence in and of itself of Dr. Simon's support of Hardy and is a part of the material assistance Dr. Simon provided directly to the campaign that is clearly relevant to whether any of Dr. Simon's efforts could be considered meaningfully independent.

Respondents argue that our recounting of the discrepancies in testimony as to how the Forum obtained the photo of Hardy that was later used in a Forum flyer promoting Hardy does not suggest coordination. Attachment 1 at 3. It is not discrepancies that support coordination, however, but rather the lack of a credible explanation of how the Hardy campaign gave the Forum a campaign photograph that the Forum used in its publication. Hardy clearly stated that he provided the photo to the Forum, but claimed he did so only at the Forum's "formal request" and that the Forum was the only organization to request that a photo be sent in with the questionnaire. Deposition of Timothy Hardy ("Hardy Depo.") at 119, 127 and 210. Dr. Simon stated unequivocally that Forum questionnaires do not include a request for a photo. However, Dr. Simon could not explain how the Forum obtained the photo. Simon Depo. at 173. The testimonies reflect that the organizations that sent questionnaires to Hardy, including the Forum, did not request photos of candidates. Thus, the fact that Hardy says he provided one or that the Forum obtained one suggests something beyond routine contacts.

The GC Brief at page 9 discusses the Forum-sponsored Swiss Hall event of April 19, 1994. Respondents attempt to minimize the significance of this event, contending that it was not solely focused on Hardy but was a multi-candidate event, at which other candidates, including

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one other federal candidate, were present. Attachment 1 at 3-5. The evidence, however, shows that this was not a multi-candidate type event, but an event whose focus was planning strategy for electing Hardy. The invitation to the event, signed by Dr. Simon, states "appreciation banquet" for precinct coordinators, lists Hardy as the featured speaker and states "We will plan strategy on how to get Tim Hardy elected." The invitation does not mention other candidates as featured speakers and though a few other candidates did attend, Hardy was the only federal candidate (there is no evidence another federal candidate was present). Moreover during the course of the event which was attended by about 200 people, Dr. Simon endorsed Hardy and Hardy made a campaign speech to the audience about his pro-life position and other issues and requested support in getting elected. Immediately after Hardy's speech and in Hardy's presence, Dr. Simon began to organize the direct mail and telephone campaign to get Hardy elected. In the recording of the event, Dr. Simon is heard responding to Hardy's request for aid by telling the audience "to move quickly to the offensive challenge" so as "to get Hardy elected as the next Congressman from Louisville," and then asking people to divide into legislative precincts, stating that he would "explain what you can do to get Tim Hardy elected."<sup>4</sup> Dr. Simon then explained that he would first do a mailing of Hardy literature and then send phone scripts to volunteers for making follow-up calls to Republican voters to ask them if they received the Hardy mailing and to urge them to vote for Hardy in the primary. The letter, dated May 12, 1994, some three weeks later, refers to an enclosed Hardy tabloid which was sent to Republican voters and includes phone scripts for first and second calls urging support for Hardy. After the

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<sup>4</sup> The recording of the event reflects that Dr. Simon began organizing the attendees right after Hardy completed his speech and Hardy himself testified that he stayed around after his speech while Dr. Simon was organizing and instructing the audience. Deposition of Timothy Hardy at 160-165 and 169.

event, the Forum workers made calls and mailed or distributed a series of pro-Hardy flyers including tabloids, letters, and sample ballots.

Ignoring these facts, Respondents argue that Hardy's presence and speech at the Swiss Hall event is not evidence of coordination because: the Forum "had no prior knowledge of Hardy's campaign strategies;" the parties did not "exchange information as to their strategies and plans"; Hardy's speech did not "convey any information about the plans, projects, and needs of the campaign," and was not "a request or suggestion of any candidate" under 2 U.S.C. § 431(17). *Id.* at 3-5. Respondents also contend that it is the General Counsel's position "that merely acquiring information as to what one party intends to do will automatically result in coordination," and states that a candidate's learning "of an organization's anticipated independent expenditure activities (whether through attendance at the organization's multi-candidate events, receipt of information about the activities, or reading about the activities in the local press)" would not result in coordination. *Id.* at 4.

First, Hardy's presence at the Swiss Hall event where he made a speech requesting support did not occur in a vacuum but was a follow-up to Hardy's earlier meeting with Dr. Simon at the Shoney's restaurant. In fact, the evidence has shown that Dr. Simon learned of Hardy's campaign plans and needs at the private meeting at Shoney's and that the Swiss Hall event was organized to further those plans and fulfill Hardy's need for support. Second, Hardy's participation in an event at which his candidacy was endorsed is coordination resulting in the event itself being an in-kind contribution from the Forum to Hardy, see GC Brief page 3. Third, counsel's assertion that Hardy's speech was not a request or suggestion is misplaced.<sup>5</sup> Also, the

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<sup>5</sup> Under 2 U.S.C. § 431(17), "independent expenditure" is defined, *inter alia*, as one "which is not made in concert with, or at the request or suggestion of" any candidate or



context in which a speech is made is a relevant factor on the issue of coordination. Hardy made a campaign speech at an event whose focus was getting Hardy elected, where the attendees had been invited to "plan strategy on how to get Hardy elected," and where Hardy's speech was immediately followed by Dr. Simon's organization of a direct mail and telephone campaign to get Hardy elected. Following up a candidate's request for support at a private event with a discussion of how that support will be forthcoming and the organizing of how to carry it out plainly represents coordination. Finally, contrary to Respondents' assertion, it is not the General Counsel's position that the mere acquiring of information automatically results in coordination. As explained above, the Swiss Hall event was not some neutral setting where Hardy just happened to hear about the Forum's plans to promote his candidacy.

In sum, and as discussed at length in the GC Brief, the Forum's expenses for the Swiss Hall event and for the tabloids promoting Hardy were in-kind contributions to Hardy.<sup>6</sup> In all, the Forum made contributions to the Hardy campaign totaling \$23,561.81.

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candidate's agent. In support of the assertion that "at the request of or suggestion of" only covers "direct" suggestions, (Attachment 1 at 3-4), Respondents cite to H.Rep. No. 917, 94th Cong., 2d Sess., 5 (1976) which states that a candidate's suggestion in a speech to a group "that everything should be done to defeat the opponent of the candidate" should not "be viewed as a 'suggestion' for purposes of the definition." Contrary to Respondents' assertion, the example cited in the House Report does not state that a candidate's suggestion has to be specific or direct for there to be coordination. Rather, it states that this type of general request would not be considered a request or suggestion. Respondents also cite to *Common Cause v. FEC*, 655 F. Supp. 619, 624 (D.D.C. 1986), rev'd on other grounds, 842 F.2d 436 (D.C. Cir. 1988) as holding that "evidence of direct coordination is the necessary prerequisite to a determination of impermissible coordination." Attachment 1 at 3-4. In *Common Cause*, however, the term "direct coordination" was used to contrast actual evidence of coordination with a presumption of coordination without evidence.

<sup>6</sup> See also MUR 3630 (Public Citizen). In that matter, the Commission found that Public Citizen's political action committee had, through numerous campaign-related communications and discussions with Newt Gingrich's 1992 primary opponent, Herman Clark, coordinated its

**C. Coordination Issue/Richard Lewis**

Richard Lewis submitted a one-page letter in response to the General Counsel's Brief. In the letter, Lewis does not address the factual and legal analysis in the GC Brief except to make a general denial that he or anyone in his campaign participated in any way in the preparation and distribution of campaign materials other than those paid for by the Lewis committee, and that he made it clear at meetings and to volunteers that his committee would be a "standalone committee." Attachment 2. Lewis also makes generalized assertions contending that there are "gross factual errors in the complaint, in the statement of the case, in the factual/legal analysis, [and] the argument presented . . . ;" and he was "denied access to interrogatories and depositions involved with this complaint including [his] own deposition".<sup>7</sup>

As with its discussion of the Hardy campaign, the Forum's counsel argues that the General Counsel mischaracterized the facts regarding the Forum Respondents' contacts with Richard Lewis and has not presented evidence of coordination. At the same time, however, Respondents also do not contest that Lewis had an initial discussion with Dr. Simon about the election; that the discussion was followed by a private meeting in Dr. Simon's medical office, where Dr. Simon and others heard Lewis and another would-be candidate discuss why they wanted to run, and that the group voted to select Lewis as the candidate to support in the general election. Respondents also do not dispute that the Forum hosted an event that featured Lewis

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"Boot Newt" expenditure campaign with the Clark campaign. The case is currently in litigation. See *FEC v. Public Citizen, Inc., et al* No. 1:97 DV-358 (N.D. GA filed Feb. 4, 1997).

<sup>7</sup> Contrary to Richard Lewis' assertions, he has not been denied the opportunity to review his own deposition. This Office has sent Lewis several letters discussing these issues. Lewis was offered the opportunity to review his transcript after the deposition and to obtain a copy after the brief was sent but chose not to avail himself of these opportunities.

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and where Forum-produced tabloids promoting Lewis were distributed; that the Forum subsequently mailed out additional Lewis flyers; and, late in the campaign, the Lewis campaign received two \$1,000 contributions from the Simon family.

Respondents contend that only "issues" were discussed at the first meeting between Lewis and Dr. Simon. Attachment 1 at 6. The evidence, however, shows that Lewis and Dr. Simon also spoke about Lewis' plans to run in the general election and that Lewis was seeking feedback from Dr. Simon about his candidacy and chances. As explained in the GC Brief, Lewis, in a letter to this Office, admitted that he spoke with Dr. Simon, among others, "to determine their interest and opinions about [his] candidacy and chances. . . ." and that "[a]s the only pro-life candidate in the general election, . . . [he] felt . . . [he] could count on the support of . . . [the] Forum." GC Brief at 18. Both Lewis and Dr. Simon testified that Lewis told Dr. Simon he was considering running as an Independent in the general election and discussed campaign issues. Deposition of Richard Lewis ("Lewis Depo.") at 233 and 235; Simon Depo. at 69. Lewis further testified that Dr. Simon answered that he was in a hurry to get somewhere but that he was interested in further discussions with Lewis. *Id.* at 236.

Respondents contend, without addressing the facts, that there is no factual support to characterize the meeting held in Dr. Simon's office as a "recruiting session for the Forum," where Lewis provided information about his "plans, projects, and needs." Attachment 1 quoting GC Brief at 19. Respondents also argue there is no basis to conclude that this meeting conveyed to Lewis that he would have the Forum's endorsement and support because we do not know what Lewis was thinking and because Dr. Simon has denied making a commitment to Lewis. *Id.*

Contrary to Respondents' assertions about the nature of this meeting, Dr. Simon himself testified that the purpose for the meeting was to select a candidate to oppose Susan Stokes in the

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general election. Simon Depo. at 72-73. According to Dr. Simon, the group heard Richard Lewis and another individual named Denny Ormerod discuss and answer questions about their respective background, experience, campaign plans, and stand on issues. *Id.* Dr. Simon testified that afterwards Lewis and Ormerod left the room while the group discussed who would make a “better candidate,” that they voted to select Lewis as the candidate they would support in the general election, and informed Lewis of the group’s decision. *Id.* at 74. Based on the above, there is no question that the purpose of the meeting was to recruit a candidate, that Lewis and the other contender discussed campaign plans, that the group voted to select Lewis as the candidate to support in the general election, and that the group (which included Dr. Simon) conveyed to Lewis that they would endorse and support his candidacy.

Respondents argue that the September 27, 1994, event at St. Luke’s Church organized by the Forum did not constitute evidence of coordination because other candidates beside Lewis were present; Lewis testified that he had no prior knowledge of who was sponsoring the event or that Forum-prepared tabloids promoting his candidacy would be distributed at the event; and, there was no evidence the Forum was aware of Lewis’ plans, projects, and needs. Attachment 1 at 7.

As with previous arguments, Respondents conclude there was no coordination without addressing all the facts in the GC Brief. Thus, Respondents suggest that the fact that other candidates were present at the St. Luke’s event means Lewis was not promoted. Respondents, however, ignore the fact that the flyer announcing the event promoted Lewis by including a photo of Lewis, which stated the purpose of the event as “to hear debates by Richard Lewis and other leading candidates,” and to obtain tabloids about Lewis. Further, Lewis was the only

federal candidate to attend the event, and boxes of Forum-produced tabloids promoting Lewis were distributed at the event. In fact, as with Hardy, this event resulted in an in-kind contribution to Lewis because of Lewis' participation at an event where his candidacy was endorsed. Finally, as discussed above, by the time the event took place, the Forum was already acquainted with Lewis' plans--from Dr. Simon's earlier meetings with Lewis.

The information gathered by Dr. Simon through discussions with Richard Lewis helped convince Dr. Simon that the Forum could embark on this expenditure campaign with confidence that Lewis was committed to running while assuring Lewis that he could count on the Forum's support. These discussions tainted the independence of the Forum's expenditures on behalf of Lewis because they were based on the Forum's knowledge of Lewis' plans, projects, and needs provided by Lewis to Dr. Simon with an expectation of support. In addition, Lewis' attendance and participation at the Forum-sponsored event, where the Forum distributed tabloids promoting his candidacy, constituted coordination between Lewis and the Forum. In all, the Forum made contributions to Lewis totaling \$14,066.29.

**D. Express Advocacy**

Respondents state that incomplete disclaimers is not an issue as to some of the Hardy and Lewis flyers because those tabloids do not contain express advocacy as "there is no explicit exhortation to vote for or against a clearly identified candidate." Attachment 1 at 7. Respondents, however, fail to identify the flyers to which they refer.

The GC Brief at pages 14-15 and 20-23 contains a full discussion of the contents of each of the Forum tabloids and the express advocacy analysis. *See also* 11 C.F.R. § 100.22(b) (codifying the express advocacy test in *Federal Election Commission v. Furgatch*, 807 F.2d 857, 862-864 (9th Cir.), *cert. denied*, 484 U.S. 850 (1978)); *but see Maine Right to Life Committee*,

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*Inc., v. Federal Election Commission*, 914 F. Supp. 8 (D.Me 1996), *aff'd*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997) and *Federal Election Commission v. Christian Action Network*, 110 F.3d 1049, 1050 (4th Cir. 1997). The Forum put out several different types of flyers in support of Hardy and Lewis and reported the expenditures for these flyers as made in support of Hardy or Lewis and in opposition to Stokes. All of the flyers clearly identified the candidate--Hardy, Lewis, or Stokes--and clearly communicated whether the Forum supported or opposed the election of that candidate. Some of the flyers were in the form of sample ballots with an arrow by the name of Hardy or Lewis and other candidates endorsed by the Forum. Other flyers included photos of Hardy or Lewis along with short articles and statements in support of the candidates, articles opposing Susan Stokes and charts contrasting Hardy's views with those of Stokes and President Clinton. One of the Forum's flyers, a reprint of a page from "The Letter," the Kentucky gay and lesbian newspaper, contains a statement urging all gay and lesbian voters to vote for Stokes in the May 24 primary. Though this flyer itself expressly advocates the election of Susan Stokes, the Forum's purpose in putting it out was to signal opposition to Stokes because of the nature of the groups supporting her election. In fact, the Forum reported this flyer as an independent expenditure made in opposition to Stokes.

#### **E. Knowing and Willful**

The GC Brief recommends knowing and willful probable cause to believe findings. GC Brief at 16-17 and 26-27. The evidence reveals a pattern of conduct that strongly suggests the Forum Respondents knew that their expenditures in support of the Hardy and Lewis campaigns were not independent at the time they were made. Specifically, as set out in the GC Brief, the evidence shows that the Forum respondents recruited, provided direct material assistance to, and

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conducted a number of joint activities with the candidates, and then tried to conceal that their expenditures had been coordinated by filing incomplete and false reports, putting out tabloids with incomplete disclaimers, and minimizing and mischaracterizing the nature of their contacts with the candidates.

For example, the evidence shows that after having been notified of the complaint alleging coordination, reporting, and disclaimer violations in the primary campaign, the Forum altered its reporting pattern from itemizing its expenditures as independent, as it previously had done, to reporting them as "Other Federal Operating Expenditures" made for the general election.<sup>8</sup> The Forum's change of procedure in reporting after receipt of the complaint strongly suggests that the change was done to conceal spending that had given rise to the complaint in the primary.

Previously, the Forum had failed to certify under penalty of perjury on Schedule E of its 1994 July Quarterly Report that its expenditures for the Hardy tabloids were not made "in cooperation, consultation or concert with, or at the request or suggestion of any candidate." The Forum could not provide an explanation for this omission. Given that the Forum recruited and provided direct

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<sup>8</sup> On its 1994 October Quarterly Report, the Forum disclosed only \$1,000 in independent expenditures made in support of Lewis. In its subsequent reports, the Forum, instead of itemizing its expenditures, as was done in its preceding reports, disclosed \$818.50 and \$4,973.10 respectively in "Other Federal Operating Expenditures" made for the general election. When questioned about this, Dr. Simon admitted that these amounts were probably for mailing of tabloids promoting Lewis, evidencing that Dr. Simon purposefully misreported these amounts. In all the Forum misreported \$5,791.60. In addition, this Office obtained documentation showing that Dr. Simon made another \$4,000 payment for the production of the "Congressional Candidate Report" tabloid. After the deposition, the Forum initially filed an amended report reflecting \$4,000 and an additional \$1,574.06 as disbursements for the general election and then later filed an amended Schedule E reflecting these same amounts as independent expenditures made in support of the Lewis campaign. Dr. Simon claimed that these amounts were not reported because the checks were written on a temporary account and did not get turned into the accountant. Thus, the Forum failed to report at all \$5,574.06 in expenditures made in support of the Lewis campaign.

material assistance to Hardy, then conducted an event whose focus was to organize a direct mail and telephone campaign for electing Hardy, the lack of a signature on the Schedule E suggests that the Forum did not want to admit that it had coordinated its expenditures with the Hardy campaign. Similarly, even though the Forum reported its expenditures for the Hardy tabloids as having been made in support of or opposition to Hardy, none of the Hardy tabloids included a proper disclaimer stating whether or not it was authorized by any candidate, further evidencing that the Forum did not want to admit coordination with the Hardy campaign. Finally, the Forum's failure to include appropriate disclaimers in the Lewis tabloids after notification of disclaimer violations with regard to the Hardy tabloids can only be viewed as knowing and willful.

The position taken by the Forum Respondents during the investigation regarding the coordination allegations provides further evidence of their attempt to conceal that their expenditures were coordinated. These respondents initially claimed that their expenditures were independent because there had been no contact with the candidates. Later, in his deposition, Dr. Simon disclosed some information about contacts but minimized or mischaracterized the nature of these contacts. The investigation, however, revealed several instances of active collaboration and contradicted Dr. Simon's testimony in various important respects, raising serious questions about the Forum Respondents' good faith belief that the expenditures were independent and suggesting that they attempted to obstruct the investigation by false testimony.

The Forum Respondents, however, contend that knowing and willful does not apply because there is no evidence of coordination. Respondents argue that the instances of contradictory testimony are due to "differing recollections" or "lack of recollection" about "relatively insignificant events that occurred three years ago." Attachment 1 at 5 and 7.

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Respondents further contend that the Forum's failure to include appropriate disclaimers in some of the tabloids was unintentional and admit that the misreporting of certain expenditures was a mistake that they have corrected with amended reports. *Id.* at 7-8. Finally, respondents take strong exception with the General Counsel's position that they should have been put on notice of the law regarding disclaimers and reporting upon their receipt of the complaint alleging violations in connection with the primary campaign. *Id.* at 8-9.

Respondents' suggestion that the contradiction in testimonies resulted because of differing recollections of long past "insignificant events" is not borne out by the testimonies. In fact, in his deposition, Dr. Simon provided much information about significant events, but his recollection seem to weaken when he was asked specific key questions about a particular aspect of the event, e.g. GC Brief pages 6, 8, and 10-12. The same occurred to a much greater degree with Hardy's testimony which contained numerous inconsistencies and significant gaps in information, e.g. Hardy Brief page 10-13. In addition, the Forum Respondents' misreporting of its expenditures and its failure to include complete disclaimers cannot be viewed as unintentional or a mistake given the evidence of their attempt to conceal their expenditures.

In light of all the foregoing, this Office recommends that the Commission find probable cause to believe that the Freedom's Heritage Forum and Frank G. Simon, M.D., as treasurer, knowingly and willfully violated 2 U.S.C. § 441a(a)(1)(A) by making \$35,583.10 in excessive contributions to the Hardy and Lewis campaigns, and knowingly and willfully violated 2 U.S.C. § 434(b) by failing to disclose the making of \$37,583.10 in contributions to the Hardy and Lewis campaigns.<sup>9</sup> In addition, this Office recommends that the Commission find probable cause to

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<sup>9</sup> The Forum Respondents have admitted to having failed to certify on Schedule E of the 1994 July Quarterly Report that the expenditures for the Hardy tabloids were not made in

believe that the Freedom's Heritage Forum and Frank G. Simon, M.D., as treasurer, knowingly and willfully violated 2 U.S.C. § 441d(a) by failing to include the appropriate disclaimers in each of the Hardy and Lewis tabloids.

Based on the factual and legal analysis contained in the Hardy Brief, this Office recommends that the Commission find probable cause to believe that Timothy Hardy knowingly and willfully violated 2 U.S.C. § 441a(f) by accepting \$22,516.81 in excessive contributions from the Forum, and violated 2 U.S.C. § 441b by knowingly accepting \$4,183.50 in prohibited corporate in-kind contributions.<sup>10</sup>

Contrary to Hardy and Dr. Simon's initial position in this matter, Richard Lewis readily admitted that he had a conversation with Dr. Simon about his candidacy. Moreover, compared with Hardy, the evidence shows that Lewis did not, for the most part, give false testimony or try to misrepresent what he thought and did during activities involving the Forum. Based on the above and this Office's interactions with Lewis throughout this matter, we have concluded that Lewis' actions were based more on a confused understanding than on a willful violation of the

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cooperation, consultation or concert with, or at the request or suggestion of any candidate or any authorized committee or agent thereof, and further admitted to having failed to file 24-hour reports for these expenditures. See First General Counsel's Report, dated June 23, 1995, Attachments 2-3. Second, during the investigation of this matter, Dr. Simon admitted that the Forum had insufficiently identified and also failed to report certain expenditures made for the Lewis tabloids. Therefore, even if the Commission were to conclude that the expenditures were independent rather than coordinated, the Forum Respondents, by their own admission, would have violated 2 U.S.C. § 434(c) by failing to certify Schedule E of the 1994 July Quarterly Report and by failing to report certain independent expenditures within the required 24-hour period; and violated 2 U.S.C. § 434(b) by misreporting certain independent expenditures as "Other Federal Operating Expenditures," and by failing to report other expenditures.

<sup>10</sup> Based on its investigation of this matter and evidence that Timothy Hardy knowingly falsified testimony during his deposition (see Hardy GC Brief), this Office believes there may be sufficient grounds to refer Hardy to the Department of Justice for criminal prosecution for obstruction of justice but we are not making such a recommendation at this time.

law and that Lewis may have believed that his participation in activities with the Forum was not coordination. Accordingly, this Office believes there may not be sufficient evidence to make knowing and willful probable cause findings with respect to Richard Lewis. In addition, the investigation has showed that unlike Hardy who worked closely with Dr. Simon and was fully aware, and encouraging, of Dr. Simon's assistance, Lewis had serious disagreement with the narrow issue approach advocated by Dr. Simon and felt profound discomfort with the realization that Dr. Simon effectively used his candidacy to defeat Susan Stokes. In light of the above and in the interest of quickly resolving this 1994 cycle matter, this Office recommends that the Commission find probable cause to believe that Richard Lewis violated 2 U.S.C. § 441a(f) by knowingly accepting \$13,066.29 in excessive contributions from the Forum, but take no further action, send a letter of admonishment, and close the matter as to this respondent.

**F. Failure to Itemize Receipts/Disbursements**

Political committees must disclose the identity of each person who makes a contribution to the committee in excess of \$200 within the calendar year. 2 U.S.C. § 434(b)(3)(A). In its 1994 July Quarterly Report the Forum reported unitemized contributions totaling in excess of \$12,000. In response, the Forum stated that it was not required to itemize its contributions because it only received contributions less than the itemization threshold imposed by the Act. During its investigation, this Office reviewed bank records of the Forum for the period in question for evidence of unitemized contributions in excess of \$200. This Office did not find evidence of such contributions in the records it reviewed. Accordingly, the Office of General Counsel recommends that the Commission take no further action as to the Freedom's Heritage

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Forum and Frank G. Simon, M.D., as treasurer, with respect to 2 U.S.C. § 434(b) regarding itemization of its contributions.

**III. DISCUSSION OF PROBABLE CAUSE CONCILIATION**

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#### IV. DISPOSITION OF OTHER RESPONDENTS

Based on the information obtained during the investigation and because this is a 1994 election cycle matter which should be resolved expeditiously, this Office recommends that the Commission take no further action as to several of the Respondents.

##### A. Arthur Cerminara

As explained in the General Counsel's Report dated October 17, 1996, the investigation revealed that Arthur Cerminara, treasurer of the Forum, has no involvement in the Forum's finances and the preparation of reports and that Dr. Simon is the individual who controls the Forum's finances and who has been performing the underlying duties of treasurer. In addition, the Commission made findings against Dr. Simon as treasurer of the Forum. Given the Commission practice of dealing with one treasurer per committee, this Office recommends that the Commission take no further action, send a letter of admonishment, and close the matter as to Arthur Cerminara.

##### B. Hardy for Congress; Lewis for Congress; Bob Ross, as Treasurer

Disclosure documents reveal that Bob Ross notified the FEC that he had resigned as treasurer of both the Hardy and Lewis committees. Ross penned a short note to the Reports Analysis Division (written on a Hardy Committee RFAI dated August 20, 1995), explaining that he had resigned as treasurer for the Hardy Committee a long time ago. Ross has also testified

that he is no longer the treasurer for the Hardy Committee and by letter dated May 19, 1995, notified the FEC that he was no longer treasurer of the Lewis Committee. Deposition of Bob Ross at 74.

The Hardy Committee has not filed any disclosure reports since its 1994 July Quarterly Report. The Lewis Committee continues to file disclosure reports, now signed by Richard Lewis, but there is no activity. As this Office's recommendations focus on the candidates directly and because both committees are essentially defunct, this Office recommends that the Commission take no further action, send letters of admonishment, and close the matter as to the Hardy for Congress Committee and Bob Ross, as treasurer, and the Lewis for Congress Committee, and Bob Ross, as treasurer.

#### **V. RECOMMENDATIONS**

1. Find probable cause to believe that the Freedom's Heritage Forum and Frank G. Simon, M.D., as treasurer, knowingly and willfully violated 2 U.S.C. §§ 441a(a)(1)(A), 434(b), and 441d(a).
2. Take no further action as to the Freedom's Heritage Forum and Frank G. Simon, M.D., as treasurer, with respect to 2 U.S.C. § 434(b) regarding itemization of its contributions.
3. Find probable cause to believe that Timothy Hardy knowingly and willfully violated 2 U.S.C. § 441a(f).
4. Find probable cause to believe that Timothy Hardy violated 2 U.S.C. § 441b.
5. Find probable cause to believe that Richard Lewis violated 2 U.S.C. § 441a(f) but take no further action and close the file as to this respondent.
6. Take no further action and close the file as to Arthur A. Cerminara.
7. Take no further action and close the file as to the Hardy for Congress Committee and Bob Ross, as treasurer.
8. Take no further action and close the file as to the Lewis for Congress Committee and Bob Ross, as treasurer.

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- 10.
11. Approve the appropriate letters.

1/15/98  
Date

  
Lawrence M. Noble  
General Counsel

**Attachments**

1. The Forum/Dr. Simon's reply brief.
2. Response Letter from Richard Lewis.
3. Federal Express delivery receipt.
- 4.
- 5.

**Staff Assigned: Dominique Dillenseger**

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